

Case No. 47641-0-II

**IN THE COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

OLYMPIC STEWARDSHIP FOUNDATION, J. EUGENE FARR,
WAYNE AND PEGGY KING, ANNE BARTOW, BILL ELDRIDGE,
BUD AND VAL SCHINDLER, RONALD HOLSMAN, CITIZENS'
ALLIANCE FOR PROPERTY RIGHTS JEFFERSON COUNTY,
CITIZENS' ALLIANCE FOR PROPERTY RIGHTS LEGAL FUND,
MATS MATS BAY TRUST, JESSE A. STEWART REVOCABLE
TRUST, CRAIG DURGAN, AND HOOD CANAL SAND & GRAVEL
LLC D/B/A THORNDYKE RESOURCE,

Petitioners,

v.

STATE OF WASHINGTON ENVIRONMENTAL AND LAND USE
HEARINGS OFFICE, acting through the WESTERN WASHINGTON
GROWTH MANAGEMENT HEARINGS BOARD; STATE OF
WASHINGTON, DEPARTMENT OF ECOLOGY; and
JEFFERSON COUNTY,

Respondents,

and

HOOD CANAL COALITION,

Respondent/Intervenor.

**AMICUS BRIEF OF FUTUREWISE &
THE WASHINGTON ENVIRONMENTAL COUNCIL**

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I. INTRODUCTION

Several of the briefs filed in this case speak of the need for “balance.”¹ But we need the right balance. As the Executive Director of the Puget Sound Partnership wrote:

“The rate at which we as a community are continuing to damage Puget Sound is greater than the rate at which we are fixing it. That equation needs to change. We need to get to a point where we have the right balance and are living with a healthy economy, a healthy community, and a healthy ecosystem.”²

Forty-five years ago the Legislature, Governor, and voters of Washington State also recognized the need to change the way we manage our shorelines, including Puget Sound. The Shoreline Management Act (SMA) recognized the need for changing the equation to achieve the right balance. RCW 90.58.020 provides that

The legislature finds that the shorelines of the state are among the most valuable and fragile of its natural resources and that there is great concern throughout the state relating to their utilization, protection, restoration, and preservation. In addition it finds that ever increasing pressures of additional uses are being placed on the shorelines necessitating increased coordination in the management and development of the shorelines of the state. The legislature further finds that much of the shorelines of the state and the uplands adjacent thereto are in private ownership; that unrestricted construction on the privately owned or publicly owned shorelines of the state is not in

¹ See Amicus Brief of Pacific Legal Foundation in Support of Petitioners p. 1.

² Puget Sound Partnership, *2015 State of the Sound: Report to the Governor and Legislature* p. 6 last accessed on June 3, 2016 at: <https://pspwa.app.box.com/v/2015-sos-governor-report>.

the best public interest; and therefore, coordinated planning is necessary in order to protect the public interest associated with the shorelines of the state while, at the same time, recognizing and protecting private property rights consistent with the public interest. There is, therefore, a clear and urgent demand for a planned, rational, and concerted effort, jointly performed by federal, state, and local governments, to prevent the inherent harm in an uncoordinated and piecemeal development of the state's shorelines.

One of the key tools provided by the Shoreline Management Act to achieve the right balance are shoreline master programs.³ Shoreline master programs are to be updated starting in 2005 and then every eight years to address changing circumstances and to work towards achieving the right balance.⁴

The *Amici Curiae* Futurewise and the Washington Environmental Council (WEC) believe the Jefferson County Shoreline Master Program starts moving the county towards the right balance. So we submit this brief to address the following issues:

- The Growth Management Hearings Board correctly quoted the Court of Appeals' *Samson* and *Lund* decisions for the proposition that "private property rights are secondary to the SMA's primary purpose, which is 'to protect the state shorelines as fully as possible.'"

³ RCW 90.58.030(3)(c); RCW 90.58.100.

⁴ RCW 90.58.080.

- The Jefferson County inventory and characterization report and other studies comply with the Shoreline Management Act and the SMP Guidelines, including the no net loss of shoreline ecological functions requirement.
- SMPs are not required to allow all uses and activities on all shorelines, even water dependent uses.

II. IDENTITY AND INTERESTS OF AMICI CURIAE

Futurewise is a statewide nonprofit organization working to ensure that local governments responsibly manage growth, including responsibly managing growth along our shorelines. Futurewise has written reports on shoreline management and reviewed and commented shoreline master program updates. Futurewise's Director of Planning & Law has also administered shoreline master programs including deciding certain shoreline permits.

The Washington Environmental Council is a nonprofit organization with more than 30,000 members statewide. Washington Environmental Council was actively involved in the creation of the Shorelines Management Act, and the organization works with partners, such as Futurewise, on public education and organizing related to shoreline master plan updates. Washington Environmental Council also works on public policy issues related to proposed gravel mines and similar

development projects that negatively impact shoreline habitat and the recovery of Puget Sound.

III. STATEMENT OF CASE

Amici Futurewise and WEC rely on the statement of the case in the Brief of Respondent Jefferson County, the Department of Ecology's Response Brief, and the Response Brief of the Hood Canal Coalition.

IV. ARGUMENT

- A. **The Growth Management Hearings Board correctly quoted the Court of Appeals' *Samson* and *Lund* decisions for the proposition that "private property rights are secondary to the SMA's primary purpose, which is 'to protect the state shorelines as fully as possible.'"**

On pages 9 through 15 of its Amicus Brief, the Pacific Legal Foundation argues that the Growth Management Hearings Board (Board) "clearly erred" when the Board quoted the *Samson* and *Lund* court of appeals decisions for the proposition that "private property rights are secondary to the SMA's primary purpose, which is 'to protect the state shorelines as fully as possible.'"⁵ The nadir of this screed is when the Pacific Legal Foundation writes that the *Samson* and *Lund* opinions are "inapposite."⁶

⁵ *Hood Canal Sand & Gravel LLC v. Jefferson County*, GMHB Case No. 14-2-0008c, Final Decision and Order (March 16, 2014), at 80 of 95.

⁶ Amicus Brief of Pacific Legal Foundation in Support of Petitioners p. 12.

The Pacific Legal Foundation is simply wrong. Here is what the Board wrote

As the Court of Appeals held in *Samson v. Bainbridge Island* “... private property rights are secondary to the SMA’s primary purpose, which is ‘to protect the state shorelines as fully as possible.’”²⁷⁰

....
²⁷⁰ *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49 (Wash. Ct. App. 2009). In which the court quoted *Lund v. Ecology*, 93 Wn. App. 329, at 336-37 (quoting *Buechel*, 125 Wn.2d at 203).⁷

Here is what the Court of Appeals wrote in *Samson v. City of Bainbridge Island*

We held that, contrary to the appellant’s claims that RCW 90.58.020 states a policy of protecting private property rights, that the private property rights are “secondary to the SMA’s primary purpose, which is ‘to protect the state shorelines as fully as possible.’” *Lund*, 93 Wn. App. at 336–37, 969 P.2d 1072 (citing *Buechel*, 125 Wn.2d at 203, 884 P.2d 910).⁸

So the Board got it right. And the Court of Appeals, of course, correctly quoted *Lund*.

Lund asserts that denying his permit because TSMP § 13.10.175 (B)(14)(1) prohibits residential development over water “thwart[s] ... the policy enumerated in RCW 90.58.020” by not protecting his private property rights. Contrary to Lund’s contention, this policy is secondary to the SMA’s primary purpose, which is “to protect the state

⁷ *Hood Canal Sand & Gravel LLC v. Jefferson County*, GMHB Case No. 14-2-0008c, Final Decision and Order (March 16, 2014), at 80 of 95.

⁸ *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334, 342 (2009) review denied *Samson v. City of Bainbridge Island*, 166 Wn. 2d 1036, 218 P.3d 921 (2009).

shorelines as fully as possible.” *Buechel*, 125 Wn.2d at 203, 884 P.2d 910.⁹

Samson, *Lund*, and *Buechel* are still good law.¹⁰

The only parts of the Board’s Final Decision and Order in this case that the Pacific Legal Foundation cites as wrong in this section of its amicus brief is the Board’s quotation from *Samson* citing *Lund* and alleged selective quoting from RCW 90.58.020.¹¹ But the material the Board quotes from RCW 90.58.020 is from RCW 90.58.020 and it is not quoted out of context.¹² So the Pacific Legal Foundation’s arguments on pages 9 through 15 of their amicus brief claiming that the Board “clearly erred” all fail.¹³

B. The Jefferson County inventory and characterization report and other studies comply with the Shoreline Management Act and the SMP Guidelines, including the no net loss requirement.

The Pacific Legal Foundation’s arguments that the Jefferson County shoreline master program inventory and other studies violate the Shoreline Management Act and the Shoreline Master Program Guidelines

⁹ *Lund v. State Dep’t of Ecology*, 93 Wn. App. 329, 336 – 37, 969 P.2d 1072, 1076 (1998).

¹⁰ *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 49, 202 P.3d 334, 342 (2009) review denied *Samson v. City of Bainbridge Island*, 166 Wn. 2d 1036, 218 P.3d 921 (2009); *Lund v. State Dep’t of Ecology*, 93 Wn. App. 329, 336 – 37, 969 P.2d 1072, 1076 (1998); *Buechel v. State Dep’t of Ecology*, 125 Wn. 2d 196, 201, 884 P.2d 910, 914 (1994).

¹¹ Amicus Brief of Pacific Legal Foundation in Support of Petitioners pp. 9 – 10.

¹² *Hood Canal Sand & Gravel LLC v. Jefferson County*, GMHB Case No. 14-2-0008c, Final Decision and Order (March 16, 2014), at 31 of 95.

¹³ Amicus Brief of Pacific Legal Foundation in Support of Petitioners pp. 9 – 10.

also fail.¹⁴ Both the Shoreline Management Act and the Shoreline Master Program (SMP) Guidelines require an inventory as part of the development of a shoreline master program.¹⁵ Neither require a “baseline” for a shoreline master program update as the Pacific Legal Foundation argues they must.¹⁶

The inventory is used to establish the shoreline master program environment designations and other shoreline regulations, such as buffers.¹⁷

The level of detail of inventory information and planning analysis will be a consideration in setting shoreline regulations. As a general rule, the less known about existing resources, the more protective shoreline master program provisions should be to avoid unanticipated impacts to shoreline resources. If there is a question about the extent or condition of an existing ecological resource, then the master program provisions shall be sufficient to reasonably assure that the resource is protected in a manner consistent with the policies of these guidelines.¹⁸

Shoreline master program environment designations are geographical segments of shoreline jurisdiction that share similar

¹⁴ *Id.* at pp. 15 – 17.

¹⁵ RCW 90.58.070(1) (inventory required for the initial shoreline master program); WAC 173-26-110(9) inventory required for comprehensive master program updates; WAC 173-26-201(3)(c). Although the Shoreline Master Program (SMP) Guidelines are called “guidelines,” they are actually binding state agency rules and shoreline master program updates must comply with them. RCW 90.58.030(3)(b); RCW 90.58.030(3)(c); RCW 90.58.080(1); RCW 90.58.080(7).

¹⁶ Chapter 90.58 RCW; Chapter 173-26 WAC.

¹⁷ WAC 173-26-201(3)(f); WAC 173-26-201(3)(g); WAC 173-26-211(5)(f)(ii)(A); WAC 173-26-221(2)(a); WAC 173-26-221(2)(c)(1)(D).

¹⁸ WAC 173-26-201(3)(g).

characteristics and are mapped based on a set of criteria.¹⁹ The environment is managed based on a purpose statement, policies, and regulations.²⁰ The regulations must include “permitted, conditionally permitted, and prohibited” uses.²¹

For example, the “Natural” shoreline environment includes “largely undisturbed portions of shoreline areas such as wetlands, estuaries, unstable bluffs, coastal dunes, spits, and ecologically intact shoreline habitats.”²² “Ecologically intact shorelines, as used here, means those shoreline areas that retain the majority of their natural shoreline functions, as evidenced by the shoreline configuration and the presence of native vegetation.”²³ The inventory is used to identify these areas.²⁴

The main requirements for a shoreline master program update inventory are in WAC 173-26-201(3)(c). Counties and cities are required to “[g]ather and incorporate all pertinent and available information, existing inventory data and materials from state and federal agencies, individuals and nongovernmental entities with expertise, affected Indian

¹⁹ WAC 173-26-211; WAC 173-26-211(4)(a)(iii).

²⁰ WAC 173-26-211(4)(a).

²¹ WAC 173-26-211(4)(a)(iv)(A).

²² WAC 173-26-211(5)(a)(iii).

²³ *Id.*

²⁴ WAC 173-26-201(3)(f).

tribes, watershed management planning, port districts and other appropriate sources.”²⁵

Local government shall, at a minimum, and to the extent such information is relevant and reasonably available, collect the following information:

(i) Shoreline and adjacent land use patterns and transportation and utility facilities, including the extent of existing structures, impervious surfaces, vegetation and shoreline modifications in shoreline jurisdiction. Special attention should be paid to identification of ecologically intact blocks of upland vegetation, developed areas with largely intact riparian vegetation, water-oriented uses and related navigation, transportation and utility facilities.

(ii) Existing aquatic and terrestrial wildlife habitats; native aquatic vegetation; riparian and associated upland plant communities; and critical areas, including wetlands, aquifer recharge areas, fish and wildlife habitat conservation areas, geologically hazardous areas, and frequently flooded areas. See also WAC 173-26-221.

(iii) Altered and degraded areas and sites with potential for ecological restoration.

(iv) Areas of special interest, such as priority habitats, ecologically intact late successional native plant communities, developing or redeveloping harbors and waterfronts, previously identified toxic or hazardous material clean-up sites, dredged material disposal sites, or eroding shorelines, to be addressed through new master program provisions.

(v) Conditions and regulations in shoreland and adjacent areas that affect shorelines, such as surface water management and land use regulations. This information

²⁵ WAC 173-26-201(3)(c).

may be useful in achieving mutual consistency between the master program and other development regulations.

(vi) Existing and potential shoreline public access sites, including public rights of way and utility corridors.

(vii) General location of channel migration zones, and flood plains.

(viii) Gaps in existing information. During the initial inventory, local governments should identify what additional information may be necessary for more effective shoreline management.

(ix) If the shoreline is rapidly developing or subject to substantial human changes such as clearing and grading, past and current records or historical aerial photographs may be necessary to identify cumulative impacts, such as bulkhead construction, intrusive development on priority and critical habitats, and conversion of harbor areas to nonwater-oriented uses.

(x) If archaeological or historic resources have been identified in shoreline jurisdiction, consult with the state historic preservation office and local affected Indian tribes regarding existing archaeological and historical information.

(xi) Information specific to the aquatic environment for siting in-water uses and development, such as sediment contamination, intertidal property ownership, aquaculture operations, shellfish beds, shellfish protection districts, and areas that meet department of health shellfish water quality certification requirements.²⁶

Local governments must then analyze this information “and as necessary to ensure effective shoreline management provisions, address

²⁶ *Id.*

...” certain topics applicable to shoreline management such as shoreline ecological functions.²⁷

Jefferson County did this work. The county had consultants prepare a *Final Shoreline Inventory and Characterization Report – Revised* that included the required inventories and analysis.²⁸ For example, the SMP guidelines quoted above require the identification and analysis of shoreline structures such as bulkheads.²⁹ The *Final Shoreline Inventory and Characterization Report – Revised* analyzed the impacts of bulkheads, identified their location, quantified them where possible, and mapped their location.³⁰ When the County conducts its next comprehensive master program update, this information can be compared with the then current location of bulkheads to determine if the SMP is effectively managing the construction of shoreline bulkheads.³¹

²⁷ WAC 173-26-201(3)(c).

²⁸ Administrative Record (AR) 6225 – 6496, ESA Adolfson *et al.*, *Final Shoreline Inventory and Characterization Report – Revised* pp. i – 6-20 (Jefferson County: Nov. 2008).

²⁹ WAC 173-26-201(3)(c)(i); (ix).

³⁰ AR 6299 – 6312, AR 6341 – 6426, ESA Adolfson *et al.*, *Final Shoreline Inventory and Characterization Report – Revised* pp. 3-35 – 3-48, pp. 4-6 – 4-88 (Jefferson County: Nov. 2008); AR 6520, Map 11: Coastal Processes and Modifications -Southeast Jefferson County Jefferson County Shoreline Map Folio (June, 2008); AR 6521, Map 12: Coastal Processes and Modifications -Northeast Jefferson County Jefferson County Shoreline Map Folio (June, 2008).

³¹ Full inventories of the type done for this update are required for comprehensive shoreline master program updates, the type of update Jefferson County did here. WAC 173-26-201(1)(b).

The Board carefully reviewed this work and found that it complied with the SMP Guidelines.³² “[T]he Board found the County completed requirements in WAC 173-26-201 (3)(c) to ‘inventory shoreline conditions’ and in WAC 173-26-201 (3)(d) to ‘analyze shoreline issues of concern.’”³³ This conclusion is followed by a detailed analysis showing how these requirements were met.³⁴

Where are the flaws in Jefferson County’s *Final Shoreline Inventory and Characterization Report – Revised*? The Pacific Legal Foundation does not say.³⁵ The Pacific Legal Foundation does write that the local government’s scientific record must identify the ecological function actually present on the shoreline.³⁶ And the *Final Shoreline Inventory and Characterization Report – Revised* does exactly that.³⁷ The Board concurred this work had been done writing that

the County’s [cumulative impact analysis] CIA identified, inventoried, and documented “current and potential ecological functions provided by affected shorelines” and proposed policies and regulations to achieve no net loss of those functions as required in WAC 173-26-186(8).⁸²

...

³² *Hood Canal Sand & Gravel LLC v. Jefferson County*, GMHB Case No. 14-2-0008c, Final Decision and Order (March 16, 2014), at 21 – 24 of 95.

³³ *Id.* at 21 of 95.

³⁴ *Id.* at 21 – 24 of 95.

³⁵ Amicus Brief of Pacific Legal Foundation in Support of Petitioners pp. 15 – 17.

³⁶ *Id.* at 17.

³⁷ AR 6299 – 6312, AR 6341 – 6426, ESA Adolfson *et al.*, *Final Shoreline Inventory and Characterization Report – Revised* pp. 3-35 – 3-48, pp. 4-6 – 4-88 (Jefferson County: Nov. 2008).

⁸² OFS Ex. 350 and ECY 000082. Jefferson County—Shoreline Master Program Update—Cumulative Impacts Analysis (CIA) (February 2010) at 3-5 See also WAC 173-26-186(8)(d). “To ensure no net loss of ecological functions and protection of other shoreline functions and/or uses, **master programs shall contain policies, programs, and regulations** that address adverse cumulative impacts and fairly allocate the burden of addressing cumulative impacts among development opportunities. Evaluation of such cumulative impacts should consider: (i) current circumstances affecting the shorelines and relevant natural processes; (ii) reasonably foreseeable future development and use of the shoreline; and (iii) beneficial effects of any established regulatory programs under other local, state, and federal laws.” (emphasis added [by the Board])

What functions did the County and the Board miss? The Pacific Legal Foundation does not say.³⁸

Interestingly, the SMP Guidelines mandate that SMPs are to require a “baseline ecological survey” for permit applications for new commercial geoduck aquaculture uses.³⁹ For ocean uses, the Ecology’s regulations require “[p]reproject environmental baseline inventories and assessments and monitoring of ocean uses should be required when little is known about the effects on marine and estuarine ecosystems, renewable resource uses and coastal communities or the technology involved is likely

³⁸ Amicus Brief of Pacific Legal Foundation in Support of Petitioners pp. 15 – 17.

³⁹ WAC 173-26-241(3)(b)(iv)(F).

to change.”⁴⁰ But studies required to update SMPs do not require baseline ecological surveys.⁴¹

C. SMPs are not required to allow all uses and activities on all shorelines, even water dependent uses.

In *Samson v. City of Bainbridge Island*, this court upheld a prohibition on the “construction of new single-use private docks and to limit dock construction in Blakely Harbor to two joint-use docks, one community dock, floats, and buoys.”⁴² The ban was upheld because privately owned docks and piers are not preferred uses of the shorelines. The court quoted a Shorelines Hearings Board decision which wrote that

Piers are listed however, as a preferred use, under improvements which facilitate public access to the state's shorelines. We conclude that the Legislature purposefully distinguished between public and private piers and did not apply any particular preference to the latter, which would limit public access in, rather than promote public access to the waters of the state.⁴³

This court concluded that the ban on private single use docks properly applied the use preferences for a shoreline of statewide significance in RCW 90.58.020 because the ban “(1) recognizing statewide interest over local interest; (2) preserving the natural character of Blakely Harbor; (3) resulting in long-term over short-term benefit; (4)

⁴⁰ WAC 173-26-360(7)(v).

⁴¹ Chapter 173-26 WAC.

⁴² *Samson v. City of Bainbridge Island*, 149 Wn. App. 33, 39 – 40, 202 P.3d 334, 337 – 38 (2009).

⁴³ *Samson*, 149 Wn. App. at 51, 202 P.3d at 343.

protecting Blakely Harbor's resources and ecology; (5) increasing access to publicly owned areas; and (6) increasing recreational opportunities for the public."⁴⁴ The court also noted that "Samson provides no authority from the SMA or elsewhere that requires the City to allow docks on every shoreline."⁴⁵

While decided before the SMP Guidelines were adopted,⁴⁶ the *Samson* decision is consistent with the guidelines. The SMP Guidelines include the use preferences from RCW 90.58.020 the *Samson* court relied on.⁴⁷ The SMP Guidelines also contain requirements the SMP must follow when deciding where to allow docks and piers and under what conditions they can be allowed.⁴⁸

In sum, the Jefferson County SMP is not required to allow docks and piers in all shorelines. That is consistent with this court's *Samson* decision the SMP Guidelines.

Respectfully submitted on May 6, 2016,



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⁴⁴ *Samson*, 149 Wn. App. at 47 – 48, 202 P.3d at 341 – 42.

⁴⁵ *Samson*, 149 Wn. App. at 51, 202 P.3d at 343.

⁴⁶ *Samson*, 149 Wn. App. at 45, 202 P.3d at 340.

⁴⁷ WAC 173-26-176.

⁴⁸ WAC 173-26-231(3)(b).

CERTIFICATE OF SERVICE

I, Tim Trohimovich, certify that I am a resident of the State of Washington, residing or employed in Seattle. I am over 18 years of age, and not a party to the above entitled action. I declare that on June 6, 2016, I caused the following documents to be served on the following parties in the manner indicated: The Motion of Futurewise & the Washington Environmental Council for *Amicus Curiae* Status and the Amicus Brief of Futurewise & the Washington Environmental Council in Case No. 47641-0-II.

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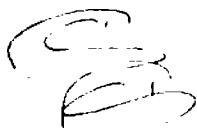
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Signed and certified on this 6th day of June, 2016,



Tim Trohimovich

FUTUREWISE

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Transmittal Letter

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Objection to Cost Bill

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Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: ____

Comments:

No Comments were entered.

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